A Labor Arbitrator's Ability to Modify A Termination Order Based on Employer Violations of the Grievance Procedure

I. INTRODUCTION

Labor relations in the United States have progressed from the physically violent confrontations of the past to today's "peaceful" negotiation and adoption of mutually beneficial understandings. These understandings are then embodied in the text of a collective bargaining agreement that is signed by both management and labor. It is this collective bargaining agreement that is the hallmark of American labor relations.

Like any other contract, once the collective bargaining agreement is signed, both parties are expected to uphold the principles contained within the contractual language. However, disputes often arise after the fact as to the interpretation to be given to specific clauses of the agreement. These disputes are resolved through the use of grievance procedures which are varied in form and scope. Still, some generalities do exist, one of which is that almost all grievance procedures utilize what is known as "step procedure." Simply put, this is a process whereby grievances start out at a low step or level, such as the grievant's immediate supervisor, and progress up steps in the chain of command found within the employer's hierarchy. As a grievance moves up the "steps," the formality of the process also increases. In the event that the parties are unable to reach a decision mutually agreeable to all, virtually every collective bargaining agreement provides for the use of labor arbitration.[1]

A labor arbitrator's powers are limited to those provided for in the collective bargaining agreement. Therefore, an arbitrator's power can vary greatly from situation to situation, with an arbitrator having absolute authority in one case, but being powerless in another. This Note will examine how far an arbitrator's interpretative powers extend.

Specifically, an arbitrator's ability to modify a termination order based on an employer's failure to follow proper grievance procedures will be considered. The discussion will begin by examining the general authority possessed by arbitrators and the source of that authority. Included will be an examination of the judiciary's power to vacate an arbitration award. Next, the history and decision of a case recently before

1. BASIC PATTERNS IN UNION CONTRACTS, 33 (BNA 1989).

the Supreme Court of Ohio will be introduced.[2]

The Ohio case has at the center of its dispute an arbitrator's modification of a termination order based on violations of the applicable grievance procedure. First, the factual and procedural history of the case will be examined to see how such a dispute can arise. Next, the case will be closely examined in order to see the many detrimental ramifications that arise from such a decision limiting an arbitrator's power to modify a termination order.

II. AN ARBITRATOR'S ABILITY TO INTERPRET COLLECTIVE BARGAINING AGREEMENTS

A. A Labor Arbitrator's Primary Role as a Contract Interpreter Includes the Ability to Fashion a Remedy When the Collective Bargaining Agreement is Silent as to the Disputed Issue

Arbitration has been defined as a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree to except as final and binding."[3] Arbitration is useful because it saves time and money, promotes the amicable resolution of disputes and provides specialized decision making. In exchange for these benefits, the parties to a collective bargaining agreement are willing to accept the arbitrator's interpretation of the agreement. In fact, the most important role played by the arbitrator is that of a contract interpreter.[4] The arbitrator's guise as contract interpreter is crucial because no matter how gifted and capable the respective contract negotiation teams are, they cannot possibly foresee all events and actions that may occur within the lifetime of the collective bargaining agreement.[5]

A labor arbitrator's role as a contract interpreter creates little controversy when the contract language explicitly sets out the remedy to be given as compensation for a particular violation.[6] When the agreement is silent as to the remedy to be given, the arbitrator's authority to make an

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2. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, 611 N.E.2d 302 (Ohio 1993).

3. Gates v. Arizona Brewing Co., 95 P.2d 49, 50 (Ariz. 1939).

4. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 342 (4th ed. 1985).

5. *Id.*

6. MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 42 (2d ed. 1991).

award is recognized. In the past, courts were very hesitant to allow an arbitrator to make awards without an express grant of authority to do so.[7] However, this is not the view presently recognized by most courts. Instead, the majority of courts hold that arbitrators are free to use their interpretive powers in fashioning remedies for those situations to which the collective bargaining agreement does not speak.[8] The policy reasons behind this view were set out by Arbitrator Willard Wirtz when he stated:

> The conclusion that no money arbitration award is proper regarding contract provisions which do not specifically provide for it would have two effects. The first would be the substitution of some other method of settlement in the place of arbitration. The second would be the cluttering up of the contract with a lot of "liquidated damage" provisions which would invite more trouble than they could ever be expected to prevent. It will be unfortunate if the collective bargaining agreements develop along the lines of the revenue laws, with provisions necessarily being made for every little hair-line question which may arise between adverse parties presenting conflicting interests. They will lose their effectiveness when they become so involved that laymen cannot follow or understand them. It would contribute dangerously to that tendency if it were required that every contract clause include a damages provision. This is the kind of thing which it must be assumed the parties intended would be handled in the light of the applicability of a particular clause to the particular problems that might arise under it.[9]

Thus, unless a collective bargaining agreement explicitly removes particular subject matter and remedies from the scope of arbitration, a labor arbitrator is free to interpret the agreement as he or she sees fit.[10]

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7. *See generally* Retail Clerks Local 782 v. Sav-On Groceries, 508 F.2d 500 (10th Cir. 1975); Leather Goods Workers Local 66 v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964); Refinery Employees v. Continental Oil, 268 F.2d 447 (5th Cir. 1959).

8. HILL & SINICROPI, *supra* note 6, at 45-46.

9. International Harvester Co., 9 Lab. Arb. 894 (BNA) (1947) (Wirtz, Arb.) *cited in* HILL & SINICROPI, *supra* note 6, at 43-44.

10. HILL & SINICROPI, *supra* note 6, at 47.

B. An Arbitrator's Award Must Draw Its Essence from the Collective Bargaining Agreement

While labor arbitrators are recognized to have broad powers of contract interpretation, these powers are not without limits. In 1960, the U.S. Supreme Court decided three cases that have come to be known as the *Steelworkers Trilogy*.[11] In one of the cases, *United Steelworkers v. Enterprise Wheel & Car Corp.*,[12] the Court made the statement that an arbitrator's decision "is legitimate only so long as it draws its essence from the collective bargaining agreement."[13] This statement has been recognized by all who practice in the field as defining the outer limits of arbitral authority.[14] Thus, an arbitrator cannot modify an unambiguous provision of the agreement in order to dispense "his own brand of industrial justice."[15]

The limitation that an arbitrator's award must draw its essence from the collective bargaining agreement naturally encourages parties to demand limitations favorable to their own position in the collective bargaining agreement.[16] Of course, the opposite is also true. When engaged in the negotiation of a collective bargaining agreement, a party should use extreme care in agreeing to exclude an issue from arbitration. This is because such restrictions absolutely preclude an arbitrator from the consideration of the excluded issues. However, absent an express restriction in a collective bargaining agreement, it is only in the most extreme circumstances that a dispute will be found to be outside the essence of the agreement, and therefore, not subject to arbitration.[17]

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11. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

12. 363 U.S. 593 (1960).

13. *Id.* at 597.

14. *See generally* ELKOURI & ELKOURI, *supra* note 4; HILL & SINICROPI, *supra* note 6, at 47.

15. Detroit Coil Co. v. Machinists Lodge 82, 594 F.2d 575, 579 (6th Cir. 1979).

16. *See, e.g.*, Texas Gas Transmission Corp. v. International Chancel Workers, 200 F. Supp. 521 (W.D. La. 1962).

17. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 586 (1976).

C. Judicial Review of Arbitration Awards

1. Private Sector

As a general principle, once the parties to a collective bargaining agreement have chosen a grievance procedure, the judiciary should be hesitant to inject itself into the arbitration process.[18] In *Enterprise Wheel & Car Corp.*, the Court made the statement that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[19] On the same day, the Court said in *United Steelworkers v. American Manufacturing Co.*:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is for the arbitrator to decide.[20]

This statement must be interpreted as giving an arbitrator broad powers to consider and remedy issues arising from a contract without fearing that a court will later vacate the remedy because it feels differently about the issues. Only when there is convincing proof that a labor arbitrator has overstepped his or her authority may a court refuse to enforce an award.[21]

However, courts have been able to substitute their own opinions for those of arbitrators by finding that the award fails to draw its essence from the collective bargaining agreement.[22] For example, in *Detroit Coil Co. v. Machinist Lodge 82*, it was stated that the arbitrator had substituted "his own views for the express provisions of the contract," and thus, the court in that case denied it was reaching the underlying merits of the dispute.[23] This and similar decisions have led some to voice the opinion

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18. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

19. 363 U.S. at 599 (1960).

20. 363 U.S. at 568 (1960).

21. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-98 (1960).

22. ELKOURI & ELKOURI, *supra* note 4, at 31.

23. 594 F.2d at 579 (6th Cir. 1979).

that courts are using the "essence from the agreement" requirement as a way to vacate arbitration awards that they feel are in error on the merits.[24]

2. *State Courts*

The uniformity of decision seen in the private sector via the federal courts is for the most part present in the public sector as well.[25] In most states, a court's authority to review an arbitration award comes from a statute that is similar to that found in the Uniform Arbitration Act.[26] Jurisdictions generally agree that a presumption is created in favor of an award's validity, and that the award will not be overturned absent arbitral misconduct or an opposing public policy.[27] Further, it appears that at least in theory, the large majority of jurisdictions follow the *Enterprise* standard of limiting judicial review to an ascertainment of whether the award draws its essence from the collective bargaining agreement.[28]

A good example of how state courts review public sector arbitration awards is found in *Board of Education of Findlay City School District v. Findlay Education Ass'n.*[29] In *Findlay,* the Supreme Court of Ohio discussed the section of the Ohio Revised Code relating to vacating an arbitrator's award,[30] and the judicial restraint necessary on the part of a reviewing court. The Court held that a reviewing court's inquiry into whether an arbitrator exceeded his or her authority is necessarily limited because a presumption exists in favor of the validity of an arbitrator's award.[31] In addition, the court also declared that "[o]nce it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious, a reviewing court's

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24. ELKOURI & ELKOURI, *supra* note 4, at 31.

25. TIM BORNSTEIN & ANN GOSLINE, LABOR AND EMPLOYMENT ARBITRATION § 60.05[1] (1988) (citing Milford Employees Ass'n v. City of Milford, 427 A.2d 859 (Conn. 1980); Board of Educ. v. Chicago Teachers Union, Local No. 1, 427 N.E.2d 1199 (Ill. 1981); State v. Berthiaume, 259 N.W.2d 904 (Minn. 1977); North Syracuse Central Sch. Dist. v. North Syracuse Educ. Ass'n, 379 N.E.2d 1193 (N.Y. 1973); Fortney v. School Dist., 321 N.W.2d 225 (Wisc. 1982)).

26. BORNSTEIN & GOSLINE, *supra* note 25, § 60.05 [1].

27. *Id.* (citing Cape Elizabeth Sch. Bd. v. Cape Elizabeth Teachers Ass'n, 459 A.2d 166 (Me. 1983)).

28. BORNSTEIN & GOSLINE, *supra* note 25, § 60.05 [1].

29. 551 N.E.2d 186 (Ohio 1990).

30. OHIO REV. CODE ANN. § 2711.10(D) (Baldwin 1990).

31. Board of Educ. v. Findlay Educ. Ass'n, 551 N.E.2d 186, 190 (Ohio 1990).

inquiry for purposes of vacating an arbitrator's award . . . is at an end."[32] The reason being, extensive judicial review of an arbitrator's decision would harm the bargain made by the parties, as well as undermine the public policy in favor of the private settlement of disputes coming from a collective bargaining agreement.[33]

III. STATE OFFICE OF COLLECTIVE BARGAINING V. OHIO CIVIL SERVICE EMPLOYEES ASS'N LOCAL 11.[34]

To this point the discussion has been of a general nature, setting out the basic principles guiding arbitrators in their deliberations and the rules governing courts in their reviewing capacity. The focus of the Note will now narrow to examine a case providing an excellent example of the detrimental ramifications that result when a court improperly vacates an arbitration award. This case is *State Office of Collective Bargaining v. Ohio Civil Service Employees Ass'n Local 11.*[35]

A. The Factual Background and the Arbitrator's Opinion

Factually, an employee of the Ohio Department of Transportation (hereinafter the State of Ohio) was accused of stealing road salt while on duty.[36] After attending a preliminary hearing on the accusation, the employee received a letter stating that he was being terminated from his position with the State of Ohio.[37] Consequently, the Ohio Civil Service Employees Association (OCSEA) grieved the termination and processed it through to arbitration.[38]

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32. *Id.* at 186-87.

33. *Id.* at 189.

34. 611 N.E.2d 302 (Ohio 1993).

35. *Id.*

36. State Dep't of Transp. v. Ohio Civil Serv. Employees Ass'n, Case No. 0037-01-06 at 4 (1989) (Smith, Arb.), *rev'd sub nom.* State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, no. 90-CVH-05-864 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

37. *Id.* at 6.

38. *Id.* at 6; *see* Contract Between the State of Ohio and the Ohio Civil Serv. Employees Ass'n Local 11 [hereinafter CBA]. Section 25.01 of the CBA states:

> A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application,

In her written opinion, the arbitrator found that the employee had in all probability taken the road salt for his own use.[39] However, the arbitrator also found that the State of Ohio had violated sections of the collective bargaining agreement relating to the grievance procedure.[40] Specifically, the arbitrator held that the State had failed to follow the requirements set out in sections 25.06 and 25.08 of the collective bargaining agreement concerning the production of relevant witnesses.[41]

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meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing a group of grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

39. State Dep't of Transp. v. Ohio Civil Serv. Employees Ass'n Local 11, Case No. 0037-01-06 at 14 (1989) (Smith, Arb.), *rev'd sub nom.* State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, no. 90-CVH-05-864 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

40. *Id.* at 17.

41. CBA, *supra* note 38, §§ 25.06 & 25.08. The text of these two sections reads as follows:

§ 25.06:

The grievant(s) and/or union steward will be permitted reasonable time off without loss of pay during their working hours to process grievances. The steward shall be given reasonable time off without loss of pay during his/her working hours to investigate grievances. Witnesses whose testimony is relevant to the Union's presentation or argument will be permitted reasonable time off without loss of pay to attend a grievance meeting and/or respond to the Union investigation. The steward shall not leave his/her work to investigate, file or process grievances without first notifying and making mutual arrangements with his/her supervisor or designee as well as the supervisor of any unit to be visited. Such arrangements shall not be unreasonably denied.

Upon request, the grievant and Union shall be allowed the use of an available, appropriate room, and copier, where available, for the purpose of copying the grievance trail while processing a grievance. The Union shall be permitted the reasonable use of telephone facilities for investigating or processing grievances. Any telephone tolls shall be paid by the Union.

Based on these findings, the arbitrator ultimately held that "discipline [was] warranted, but the Employer's action must be modified in light of its violation of the terms agreed to at the bargaining table."[42]

B. The Opinions of the Lower Courts

1. The Decision of the Court of Common Pleas, Franklin County, Ohio

Upon receiving the arbitrator's opinion, the State of Ohio filed a motion to vacate the arbitrator's award.[43] In a two page decision, the Court of Common Pleas, Franklin County, Ohio, held that the arbitrator had exceeded the authority given to her under section 2711.10(D) of the Ohio Revised Code.[44] Section 2711.10(D) reads:

> In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

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§ 25.08

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

The State of Ohio argued to the arbitrator that OCSEA's request was unreasonable for cost containment reasons. However, the arbitrator found such an argument a "weak justification" for the failure to produce the requested witness. *See* State Dep't of Trans. v. Ohio Civil Serv. Employees Ass'n Local 11, Case No. 0037-01-06 at 17 (1990) (Smith, Arb.), *rev'd sub nom.* State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, no. 90-CVH-05-864 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 5534 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

42. State Dep't of Transp. v. Ohio Civil Serv. Employees Ass'n Local 11, Case No. 0037-01-06 at 18 (1989) (Smith, Arb.), *rev'd sub nom.* State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, no. 90-CVH-05-864 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

43. The motion was filed pursuant to OHIO REV. CODE ANN. § 2711.13 (Baldwin 1990).

44. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 90-CVH-05-864, slip op. at 2 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[45]

The court found that this section was violated by the arbitrator's consideration of whether the discipline given fit the violation.[46] As support for this holding, the court stated that "once the Arbitrator found just cause for the discipline in spite of the procedural violations, she was without authority to modify the discipline. She was vested only with the power to decide the just cause issue."[47]

2. *The Decision of the Court of Appeals of Ohio for the Tenth Appellate District*

As might be expected, OCSEA did not agree with the decision of the court of common pleas (hereinafter the trial court), and therefore, appealed the decision to the Court of Appeals of Ohio for the Tenth Appellate District (hereinafter *OCB v. OCSEA*).[48] While it affirmed the trial court's decision, the court of appeals did so for different reasons than those used previously.

The court first noted that the collective bargaining agreement in question contained a provision stating that "[d]isciplinary measures shall not be imposed upon an employee except for just cause."[49] The court also noted that the "[d]isciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."[50]

After a discussion of the grievance procedure found in the collective bargaining agreement,[51] the court restated the question that the parties had agreed to submit to the arbitrator:

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45. OHIO REV. CODE ANN. § 2711.10(D) (Baldwin 1990).

46. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 90-CVH-05-864, slip op. at 2 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

47. *Id.*

48. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

49. *Id.* at *1.

50. *Id.*

51. *Id.* at *2.

> Did the Department of Transportation remove the Grievant, [name of grievant], from his position of Equipment Operator 1 for Just Cause in accordance with Article 24 of the Agreement? If not, what should be the remedy?[52]

In referring to the trial court's determination that the arbitrator had exceeded her authority, the court stated that "[e]ven where it is alleged that the arbitrator exceeded his or her authority, a reviewing court's inquiry is necessarily limited by the presumed validity of the arbitrator's award."[53] Using this standard, the court posited that an award may be vacated only in those situations where the arbitrator has considered an issue which the collective bargaining agreement exempts from arbitration,[54] or where the arbitrator's award draws its essence from a source other than the collective bargaining agreement.[55]

After setting out these general principles, the court found that the arbitrator had not considered an issue which the collective bargaining agreement exempted from arbitration.[56] In support of this finding, the court stated that an issue submitted to arbitration will be given a broad interpretation,[57] thereby creating a presumption that the arbitrator has acted within the authority granted by the collective bargaining agreement.[58] From this, the court determined that an arbitrator's investigation into the existence of "just cause" could include an inquiry into the procedural and substantive aspects of the grievance,[59] as well as

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52. *Id.* at *1.

53. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App. 1992 WL 55434 at *2 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

54. *Id.*

55. *Id.*

56. *Id.* at *3.

57. *Id.*

58. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App., 1992 WL 55434 at *3 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993) (citing Champion Int'l Corp. v. United Paperworkers Int'l Union, 779 F.2d 328, 335 (6th Cir. 1985)).

59. *Id.*; *see* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Johnston Boiler Co. v. Local Lodge No. 893, 753 F.2d 40 (6th Cir. 1985); Chauffeurs Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir. 1980). These cases hold that the procedural propriety of a discharge is sufficiently integral to just cause to sustain an arbitrator's ruling on that issue.

an inquiry into whether the discipline fit the violation.[60]

Finally, the court addressed the issue of whether the arbitrator's decision drew its essence from the collective bargaining agreement. As a starting point, the court quoted the well known maxim that an "arbitrator is granted considerable latitude to interpret and apply the collective bargaining agreement . . . in order to remedy a violation of the contract."[61] This rule of law was interpreted to mean that the arbitrator had the power to review whether the sanction handed down by the State of Ohio was reasonable,[62] and as a necessary part of this review, whether the State of Ohio had violated grievance procedures.[63]

At this point, the court, in the remaining one page of a fifteen page decision, abruptly held that the arbitrator's award did not draw its essence from the collective bargaining agreement because it was punitive in nature and not remedial.[64] The court went on to say that its finding meant that "[a]bsent contractual language to the contrary, an arbitrator has no power to reinstate an otherwise properly discharged employee merely because the employer violated a provision of the grievance procedure."[65]

3. The Decision of the Supreme Court of Ohio

OCSEA appealed the above referenced decision to the Supreme Court of Ohio, who, on May 12, 1993, ruled in favor of OCSEA.[66] But, the decision given by the Court consisted of a one sentence holding stating that the cause was reversed on the authority of *Queen City Lodge No. 60 Fraternal Order of Police v. Cincinnati*.[67] In *Queen City*, the Court had set out the broad holding that "once a violation of a collective bargaining agreement is found, an arbitrator is presumed to possess implicit remedial

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60. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App. 1992 WL 5534 at *3 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993) (citing Industrial Mutual Assoc., Inc. v. Amalgamated Workers Local Union No. 383, 725 F.2d 406, 410 (6th Cir. 1984)).

61. *Id.* at *4.

62. *Id.*

63. *Id.* at *5.

64. *Id.* at *4-5. It is interesting to note that after approximately 14 pages of careful analysis of the relevant case law, the court reached its finding on the punitive nature of the award without citing a single case.

65. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App. 1992 WL 5534 at *5 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

66. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, 611 N.E.2d 302 (Ohio 1993).

67. 588 N.E.2d 802 (Ohio 1992).

power, unless the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the arbitrator."[68] By citing this broad statement as the basis of its holding, the Supreme Court of Ohio does not give due deference to the importance that procedure plays in labor grievance disputes. Further, by not giving clear guidelines in this area, the Supreme Court's decision gives both employers and unions the opportunity to claim that their facts warrant special consideration in attempting to vacate an arbitration award. Such actions severely undermine the economic advantages presented in arbitration. Therefore, in order to provide some guidance, this Note will next focus on the opinion of the Ohio Court of Appeals in *OCB v. OCSEA*, and the reasons arbitrators must have the particular power to remedy purely procedural violations of the grievance process.

C. The Labor Grievance Procedure Used by the Parties in OCSEA

The grievance procedure used by the State of Ohio and OCSEA is typical of that seen in most collective bargaining agreements throughout the country in that it uses what are known as grievance steps.[69] A grievance step is simply a way to resolve a grievance that has been agreed to by the parties to the agreement. At the lower steps, the method used is quite informal and basic. For example, in the collective bargaining agreement between the State of Ohio and OCSEA, Step One requires the grievant or the union or both, to orally raise the grievance with the immediate supervisor of the grievant.[70] If the grievance is not settled at Step One, Step Two requires that a written copy of the grievance be submitted to the intermediate administrator.[71] However, should the grievance continue to remain open, it passes through steps that become more and more formal until ultimately, in Step Five, it is submitted to arbitration.[72]

In addition to the grievance steps, various grievance rules exist to protect the parties to a collective bargaining agreement. The State of Ohio and OCSEA agreed to rules governing time requirements, discovery and the production of information.[73] In fact, the issue before the Supreme Court of Ohio arose from rules concerning the production of all relevant

68. *Id.* at 407.

69. ELKOURI & ELKOURI, *supra* note 4, at 165.

70. CBA, *supra* note 38, § 25.02.

71. *Id.*

72. *Id.*

73. *See generally* CBA, *supra* note 38, § 25.

witnesses.[74]

IV. PROBLEMS ARISING FROM THE HOLDING IN OCB V. OCSEA

At first glance, it would appear that the holding in *OCB v. OCSEA* could have little effect on the practice of labor arbitration. After all, the decision is of an Ohio appellate court and only purports to hold that the arbitrator's award was vacated because it was punitive in nature. However, this decision could have serious repercussions should other courts choose to adopt a similar line of reasoning. Not only could the benefits of arbitration be lost, but employers would have a way to "end run" the negotiation process. In addition, the decision can be viewed as one in which a court has substituted its sense of justice for that of the arbitrator. Finally, the decision reduces in importance the crucial role that grievance procedures play in the just resolution of labor disputes.

A. The Holding in OCB v. OCSEA Removes the Benefits of Grievance Procedures

In the extremely adversarial world within which management and labor coexist, grievance arbitration is almost unique in its unbridled acceptance by both sides.[75] This stems from many things, not the least of which are the services of a specialized decision maker and the savings in time and money.[76]

Grievance procedures save parties time and money that would have been expended in litigation. Every year more than ten thousand grievances are settled in a manner that is quick and amicable.[77] However, should courts choose to adopt the holding of *OCB v. OCSEA*, these benefits will soon disappear because unions and employees will be forced to rely on the courts in order to have a grievance procedure enforced. The increase in expenses and delays that will result could be fatal to many companies, not to mention the harm that will occur to unions and employees. Perhaps the point is best summarized as follows:

> In an arbitration, the power to award a remedy usually accompanies the power to consider whether a bargaining

74. CBA, *supra* note 38, §§ 25.06, 25.08.

75. *Id.*

76. ELKOURI & ELKOURI, *supra* note 4, at 7.

77. *Id.* at 6.

> agreement violation has occurred. If it did not, some of the major benefits of arbitration would be undermined. If the prevailing side in an arbitration were routinely forced to go to a court of law (or to another arbitration) to win remedy, the time and cost advantages of arbitration would be lost.[78]

Another benefit of arbitration is that in most instances, the arbitrator is a labor specialist, and therefore, is knowledgeable as to the conditions and inner workings of the job site. On the other hand, courts are often unschooled in the peculiar circumstance found in a labor setting.[79] Because of this, some countries have gone so far as to establish specialized labor courts within the framework of their main judicial systems.[80] Nor has the specialized nature of labor relations escaped the attention of the U. S. Supreme Court. The Court, in reference to the expertise of labor arbitrators, has stated:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[81]

However, if the holding of the Ohio appellate court in *OCB v. OCSEA* is to become the general rule, the courts will be deciding whether a given grievance procedure was followed and, thus, determining whether just cause was found. Consequently, the expertise of labor arbitrators would

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78. Mahoning County Bd. of Mental Retardation v. Mahoning County TMR Educ. Ass'n, 488 N.E.2d 872, 875 (1986).

79. ELKOURI & ELKOURI, *supra* note 4, at 7-8.

80. *Id.*

81. *Id.* at 7-8 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960)).

be rendered meaningless. Such a rule takes from employers and employees the unique benefits of arbitration.

B. It is the Arbitrator's Duty to Preserve the Terms of a Collective Bargaining Agreement

It was stated above that in order for an arbitrator's award to be valid, the award must draw its essence from the collective bargaining agreement.[82] It is also recognized that an arbitrator's most important duty is that of interpreting an agreement.[83] From these two principles comes the realization that what an arbitrator actually does is preserve the terms and intent of a collective bargaining agreement.

A particular arbitrator is chosen because the parties desire an individual with some working knowledge of the conditions of employment prevalent in the workplace.[84] The arbitrator is also expected to know both the terms of the contract and the practical considerations needed to further productivity.[85] The State of Ohio and OCSEA had negotiated and agreed to a collective bargaining agreement containing a grievance procedure for the settlement of disputes.[86] The parties had also agreed to the use of a particular arbitrator.[87] Therefore, both parties had a right to expect that the procedure agreed to would be followed, and that if the arbitrator found a violation of this procedure, she would be able to remedy that violation.[88]

In *OCB v. OCSEA,* the appellate court found that the arbitrator did not add to, subtract from, or modify any express or unambiguous contract language by considering the procedural error issue.[89] While the collective bargaining agreement did contain rules to be followed when processing grievances, it did not provide for explicit remedial measures in the event a rule was violated.[90] However, in applying the interpretive

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82. *See supra* notes 2-7 and accompanying text.

83. *See supra* notes 8-11 and accompanying text.

84. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

85. *Id.*

86. CBA, *supra* note 38.

87. CBA, *supra* note 38, § 25.04.

88. ELKOURI & ELKOURI, *supra* note 4, at 160 (citing Fiberboard Paper Prods. Corp., 39 Lab. Arb. 691, 695 (BNA) (1962) (Koven, Arb.)).

89. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App., 1992 WL 55434, at *3 (10 dist. Mar. 17, 1992), *rev'd,* 611 N.E.2d 302 (Ohio 1993).

90. CBA, *supra* note 38, § 25.

powers she implicitly possessed, the arbitrator held that to ignore the State of Ohio's violations of the collective bargaining agreement "would be to excise [those] sections from the agreement, clearly beyond arbitral authority."[91] In other words, if the arbitrator had not held the way that she did, the relevant terms of the collective bargaining agreement would have been effectively taken out of the agreement without the parties having the opportunity to negotiate the matter. This would circumvent the entire negotiation process that is the foundation of labor legislation,[92] and prevent arbitrators from carrying out their duty to preserve the terms of a collective bargaining agreement.

C. The Appellate Court's Holding in OCB v. OCSEA is an Example of a Court Improperly and Erroneously Substituting Its Interpretation of the Collective Bargaining Agreement for that of an Arbitrator

1. The Court Improperly Substituted Its Interpretation of the Collective Bargaining Agreement for that of the Arbitrator

It is without question that once the parties to a collective bargaining agreement have chosen a particular grievance procedure, courts should be hesitant to inject themselves into the arbitration process. Extensive judicial review of an arbitrator's decision "would defeat the bargain made by the parties. . . ."[93] In spite of such admonishments by the Supreme Court of its own state, the appellate court in *OCB v. OCSEA* chose to substitute its decision for that of the arbitrator.

Initially, the appellate court in *OCB v. OCSEA* held that the "procedural propriety" of a termination was a component of the "just cause" required by the collective bargaining agreement.[94] However, at a later point in the opinion, the court held that the consideration of procedural errors was punitive in nature, and therefore, such errors could not justify the modification of the termination order.[95] That these two

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91. State Dep't of Transp. v. Ohio Civil Serv. Employees Ass'n Local 11, Case No. 0037-01-06 at 18 (1989) (Smith, Arb.), *rev'd sub nom.* State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, no. 90-CVH-05-864 (Franklin County Ct. of C.P., May 28, 1991), *aff'd*, no. 90-AP-681, Ohio App., 1992 WL 55434 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

92. National Labor Relations Act, 29 U.S.C. §§ 151-168 (1988).

93. Goodyear v. Local Union No. 200, 330 N.E.2d 703, 706 (Ohio 1975).

94. State Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n Local 11, No. 91-AP-681, Ohio App., 1992 WL 55434, at *3 (10 dist. Mar. 17, 1992), *rev'd*, 611 N.E.2d 302 (Ohio 1993).

95. *Id.* at *4-5.

statements cannot logically coexist is easily apparent. Either the consideration of procedural errors in determining "just cause" is appropriate, and a remedy based on such a consideration is not punitive, or the consideration of such errors is inappropriate, and any resulting remedy is punitive. What was already an unclear situation was exacerbated by the court's failure to include any authority for its finding that the award was punitive in nature.[96] Therefore, it would appear that instead of giving the arbitrator the deference she was due, the court was interjecting its own opinion as to the proper outcome of the arbitration decision.

Such judicial intervention robs the parties to a collective bargaining agreement of the procedural protections that they have bargained for. If a party does not want a particular issue submitted to arbitration, he or she can attempt to inject into the agreement a restriction limiting what issues may be arbitrated. For example, included in the collective bargaining agreement between the State of Ohio and OCSEA was the following provision:

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. **In cases involving termination, if the arbitrator finds that there has been an abuse of a patient of another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse.**[97]

The language highlighted clearly precludes an arbitrator from modifying in any way the termination order of an employee shown to have abused patients. When a court acts as the Ohio appellate court in *OCB v. OCSEA* did, such court is forcing the parties to a collective bargaining agreement to include in the agreement restrictions on arbitration that the court thinks are just. In the area of labor arbitration, such judicial activism could be termed "judicial contracting," and in effect, adds the following italicized language to the above cited passage:

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases

96. *Id.*

97. CBA, *supra* note 38, § 24.01 (emphasis added).

> involving termination, if the arbitrator finds that there has been an abuse of a patient of another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse. *In addition, the arbitrator has no power to reinstate an otherwise properly discharged employee merely because the employer violated a provision of the grievance procedure.*[98]

Therefore, if the appellate court's decision in *OCB v. OCSEA* is adopted by others, the courts will have entered into the business of modifying collective bargaining agreements so that they comport with a court's view of labor relations.

2. *The Court Erroneously Decided that the Award Given by the Arbitrator was Punitive in Nature*

It is well settled that along with determining the substantive aspects of a labor grievance, an arbitrator is also permitted to determine any procedural issues that arise along the way.[99] "Once it is determined . . . that the parties are obliged to submit the subject matter of a dispute to arbitration, procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."[100]

In the event of a procedural violation, three possible courses of action are open to an arbitrator: (1) nullify the entire action; (2) nullify the action only if the employee can show that he was prejudiced by the violation; or (3) modify the award in some manner short of an absolute nullification.[101] Of course, in deciding which of these three options to use, the past actions of the parties should be considered. In the case of the State of Ohio and OCSEA, on at least one previous occasion an arbitrator had held that the State of Ohio had tainted a termination by a failure to follow proper grievance procedures.[102] In that case, the arbitrator chose to follow the third alternative listed above in modifying the termination order. Likewise, in *OCB v. OCSEA*, the arbitrator chose to allow the employee to be disciplined, but in some manner short of the termination

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98. *Id.*

99. ELKOURI & ELKOURI, *supra* note 4, at 674-75.

100. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964).

101. R.W. FLEMING, THE LABOR ARBITRATION PROCESS 139 (1965).

102. State v. Ohio Civil Serv. Employees Ass'n No. G87-1494 (1988) (Pincus, Arb.). In this case, a state employee was accused of stealing firewood he cut down and took to his home. As in *OCB v OCSEA*, the State of Ohio failed to provide information pursuant to § 25.08 of the CBA. *See supra* note 38.

handed down by the employer. Thus, the past practice of the parties supported the arbitrator's decision and weighed against a finding that the award was punitive.

If one takes a literal approach, "punitive" is defined as "[r]elating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty."[103] "Compensation" is "[t]hat which is necessary to restore an injured party to his former position."[104] Clearly, an employer's failure to follow the proper grievance procedures can have a detrimental affect on an employee. For instance, in the situation where an employer fails to allow other employees to testify as witnesses on behalf of a grievant, the grievant may be unable to put on an adequate defense. In fact, in a discharge case such as *OCB v. OCSEA*, the only protection an already terminated employee has is the grievance procedure set out in the collective bargaining agreement.

Unfortunately, in the context of procedural violations, it is impossible to go back in time and require the employer to give the grievants that which they are due. When an arbitrator modifies a termination order based on procedural violations of the employer, the arbitrator is compensating the employee in the only way possible. In addition, the arbitrator is compensating the union involved for the employer's procedural violations, both present and future, by "encouraging" the employer to comply with his obligations. Therefore, when an arbitrator modifies a termination order due to the procedural violations of the employer, the arbitrator is merely giving the employee that which he or she was due under the collective bargaining agreement and not punishing the employer.

D. The Importance of Procedural Rules

This Note is concerned with an arbitrator's ability to consider rules of grievance procedure. Procedure is "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery as distinguished from its product."[105] The one true test of a system of procedure is to ask if it provides just and correct outcomes.[106] While this Note is concerned with the procedural aspects of labor grievances, the concept of procedure

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103. BLACK'S LAW DICTIONARY 1234 (6th. ed. 1990).

104. *Id.* at 283.

105. *Id.*

106. COUND ET AL., CIVIL PROCEDURE, CASES AND MATERIALS 2 (5th ed. 1989).

is most commonly thought of as a judicial concept.[107] Therefore, a brief look at the function and importance of procedure in the civil and criminal law setting is in order before examining the importance of procedure in the effective resolution of labor grievances.

1. The Function and Importance of Procedural Rules in Civil and Criminal Cases

The United States judicial system is adversarial.[108] Simply put, the adversarial system holds that the responsibility for going forward with the various aspects of litigation rests almost exclusively on the shoulders of the parties.[109] This in turn places the parties in a position of monitoring the other side. If one views the adversarial system as a contest,[110] the procedural rules are nothing more than the "out of bounds" lines within which the adversarial processes must be played out.

In civil cases, procedure serves to balance, at least to some degree, the advantage one party has over another in terms of resources and money.[111] By placing limits on discovery and providing for specific dates of filing, the Federal Rules of Civil Procedure are making an attempt to place the parties on equal footing.[112] Another important function of the Federal Rules is that of preserving a party's Fourteenth Amendment Due Process rights.[113] To accomplish this goal, the Rules provide that virtually every document filed with a court in relation to a particular matter must be served "upon each of the parties."[114] This is based on the long established principle of United States law that "[t]he fundamental requisite of due process of law is the opportunity to be heard."[115] The notice given does not have to be the best possible, but must function to reasonably convey the information required.[116] However, the means that are used must be calculated to actually inform the opposing party in order to meet due process requirements.[117]

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107. *See, e.g., id.* at 1.
108. *Id.* at 1.
109. *Id.*
110. *See, e.g., id.* at 2.
111. *See* FED. R. CIV. P. 1.
112. *See* FED. R. CIV. P. 5, 26.
113. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950).
114. FED. R. CIV. P. 5(a).
115. Grannis v. Ordean, 234 U.S. 385, 394 (1914).
116. *Mullane*, 393 U.S. 306, 344.
117. *Id.* at 315.

Perhaps even more important than the role procedure plays in civil cases, is its role in the criminal system. It is certainly true that civil cases can involve millions, and in some cases, even billions of dollars. However, criminal cases involve something even more valuable: personal freedom. It is for that reason that the rules of criminal procedure are inseparably intertwined with constitutional freedoms.

For example, the Sixth Amendment provides that each defendant in a criminal trial shall be given the benefit of the effective assistance of counsel at all stages of the proceedings against him or her.[118] In fact, the right to the assistance of counsel extends in some situations to pretrial proceedings.[119] In the event that evidence is found during a period when a defendant is not provided with adequate counsel, that evidence is often excluded, regardless of how conclusive it might be.[120]

Thus, it is seen that the civil and criminal rules of procedure perform the function of balancing inequities in money and resources, as well as protecting the guarantees found in the Constitution. The same functions are seen in the context of grievance procedures.

2. *The Importance of Procedure in Labor Grievances*

One of the most appealing features of collective bargaining agreements is that the parties can include those provisions that they feel are important, and a provision contained in all labor agreements is one setting out some type of grievance procedure.[121] Because it is created by private parties via a collective bargaining agreement, a grievance procedure must be self-governing, and dependent on the good faith of the parties. Therefore, it is not uncommon for the parties to a collective bargaining agreement to create their own "common law" procedures for the resolution of grievances.[122] These procedures are usually not found in the collective bargaining agreement, but instead, arise as the parties become more experienced in the arbitration process.[123] Some examples are "pre-hearing submissions, order of presentation, stipulations of fact and administrative/procedural matters affecting the hearing."[124]

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118. Spano v. New York, 360 U.S. 315, 327 (1959).

119. Massiah v. U.S., 377 U.S. 201, 204-05 (1964).

120. *Id.*

121. *See generally* LEE H. HILL & CHARLES R. HOOK, JR., MANAGEMENT AT THE BARGAINING TABLE 199 (1945).

122. BORNSTEIN & GOSLINE, *supra* note 25, § 1.01[7][b].

123. *See id.*

124. *Id.*

If such procedures can be considered a private form of "common law," it is not beyond reason to consider the collective bargaining agreement a private "constitution." Like the United States Constitution, the purpose of the collective bargaining agreement is to protect the rights of individuals, here employees. And, like the citizens of the United States in the late eighteenth century, the employees do not sign their collective bargaining agreement, but rather appoint representatives for that purpose. However, the most important similarity between the United States Constitution and a collective bargaining agreement is that both can be relied upon by individuals as unchanging representations of minimum guarantees.

One of the guarantees of the Constitution, the Sixth Amendment Right to Counsel, was discussed above. A good example of the guarantees present in collective bargaining agreements is found in the agreement between the State of Ohio and OCSEA.

The issue before the appellate court in *OCB v. OCSEA* concerned the application of two provisions of the grievance procedure in the collective bargaining agreement.[125] The text of the two sections reads as follows:

> § 25.06
>
> The grievant(s) and/or union steward will be permitted reasonable time off without loss of pay during their working hours to process grievances. The steward shall be given reasonable time off without loss of pay during his/her working hours to investigate grievances. Witnesses whose testimony is relevant to the Union's presentation or argument will be permitted reasonable time off without loss of pay to attend a grievance meeting and/or work to investigate, file or process grievances without first notifying and making mutual arrangements with his/her supervisor or designee as well as the supervisor of any unit to be visited. Such arrangements shall not be unreasonably denied.
>
> Upon request, the grievant and Union shall be allowed the use of an available, appropriate room, and copier, where available, for the purpose of copying the grievance trail while processing a grievance. The Union shall be permitted the reasonable use of telephone facilities for investigating or

125. CBA, *supra* note 38, § 25.06.

> processing grievances. Any telephone tolls shall be paid by the Union.
>
> § 25.08
>
> The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.[126]

It is important to note that these two sections do not exist in a vacuum, but rather, work in conjunction with the entire grievance procedure already described above.[127] Also important is the fact that the language used in each respective section, "will" in section 25.06, and "shall" in section 25.08, indicate that the parties intended for the requirements of these sections to be mandatory.[128]

If one continues with the analogy relating a collective bargaining agreement to the Constitution, it can be said that an employee who has been terminated from his employment has received what amounts to an "employment death sentence." Having received such a sentence, the employee hopes to appeal it through the grievance procedures found in the collective bargaining agreement. He fully expects that if he fails to meet even one of the timeliness requirements, his grievance will be kicked out.[129] On the other hand, the employee also expects that the employer will meet whatever requirements the agreement compels. Thus, if the employee requests the production of a document or witness crucial to his side of the grievance, the employer must be required to produce the requested documents.[130] In fact, the employee's case may turn on the production of the requested information.

The opinion of the appellate court in *OCB v. OCSEA* exempts the employer from fulfilling his duties under the collective bargaining agreement. Continuing the analogy from above, the State of Ohio is in a position equal to that of a police officer who violates a defendant's Sixth Amendment rights. It appears that courts such as that in *OCB v. OCSEA* would find that the police officer's actions were wrong, but would then do

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126. *Id.* § 25.08.

127. *See supra* notes 52-57.

128. CBA, *supra* note 38, §§ 25.06-25.08.

129. *See generally* CBA, *supra* note 38, art. 25.

130. It is assumed that the collective bargaining agreement provides for the production of information.

nothing to aid the defendant. A right does a party little good if that right is not to be enforced, and the court's opinion strips arbitrators of the power to enforce the necessary procedural safeguards found in collective bargaining agreements.

V. CONCLUSION

Jurisdictions across the country must recognize that a labor arbitrator has the authority to modify a termination based on an employers violation of grievance procedures. To hold otherwise, strips arbitration of the benefits it provides, prevents an arbitrator from carrying out the duty of preserving the contract, allows a court to substitute its sense of justice for that of an arbitrator, and fails to recognize the importance of grievance procedures. Once the terms to a collective bargaining agreement are negotiated and set forth in a written contract, the parties must be held to the standards they themselves have created. If an arbitrator can not hold the parties to these standards, the collective bargaining agreement ceases to exist as a binding agreement between the opposing sides, and instead becomes an unenforceable collection of randomly applied standards.

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